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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CESAR NIETO CAMACHO, Defendant and Appellant.	G039380 (Super. Ct. No. 04HF1453) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Late at night, a highly intoxicated Cesar Nieto Camacho (his blood-alcohol content was between .26 percent and .32 percent), was driving his car at speeds of almost 100 miles per hour on the southbound 405 freeway. His tire blew out, but he kept speeding down the freeway until eventually he spun out causing an accident in which David Daniel Parrino was thrown off his motorcycle and into oncoming traffic, where he was run over by another vehicle and killed. Camacho drove off and was found further down the freeway on the side of the road. Camacho, who has three prior drunk driving convictions, was convicted of murder (Pen. Code, § 187) (count 1), gross vehicular manslaughter with a prior driving under the influence (DUI) conviction (Pen. Code, § 191.5, subd. (d)) (count 2), felony hit and run driving (Veh. Code, § 20001, subds. (a) & (b)(2)) (count 3), and driving on a suspended license (Veh. Code, § 14601.5, subd. (a)). A Vehicle Code section 20001, subdivision (c), allegation (fleeing scene after committing gross vehicular manslaughter) was found true as to count 2, as was an allegation that as to count 4 (driving on a suspended license) Camacho has a prior conviction for driving on a suspended license (Veh. Code, § 14601.5, subd. (d)). The trial court sentenced Camacho to 15 years to life in prison on count 2, plus a consecutive five-year term on the enhancement. The court either stayed or suspended sentences on the other counts.

On appeal, Camacho contends: (1) trial on the allegation of a prior driving on a suspending license conviction should have been bifurcated; (2) the trial court erred by admitting evidence of statements made by Camacho after the accident; (3) his proffered special jury instruction on causation was improperly refused; (4) the trial court applied the wrong standard in ruling on his motion for acquittal under Penal Code section 1118.1; and (5) the prosecutor committed *Griffin*[1] error in closing argument. We find no merit to Camacho's contentions and affirm the judgment.

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[1] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

FACTS

At about 1:30 a.m., on September 18, 2004, 18-year-old Ryan Hovey was driving his mother's car south on the 405 freeway with three friends going on a trip to Baja California. They were traveling between 70 and 80 miles per hour. Hovey denied that either he or his passengers had been drinking or using drugs.

Hovey noticed a motorcycle pass him going between 80 and 90 miles per hour. Moments later, a Mercedes driven erratically passed him as well. The Mercedes crossed several lanes of traffic at right angles, swerved, and almost hit another motorist. One of Hovey's passengers said something about the Mercedes having a flat tire or that the tire had popped. Hovey did not feel particularly endangered by the Mercedes as it was fairly far away from him. Hovey noticed sparks from the rear of the Mercedes as it passed.

About five minutes later, Hovey noticed sparks about 40 feet in front of him. About a second later, he saw a riderless motorcycle moving across the lanes in front of him to the right side of his car and he then saw the rider (Parrino) in the lane in front of him. Hovey hit his brakes and tried to slow down, but there was no time for him to do anything. He struck Parrino. Hovey pulled over and stopped his car. He and his passengers got out and ran back to Parrino and the police arrived.

Nicholas Wheat was a passenger in Hovey's car. He too denied they were drinking or using drugs. Wheat saw a white car (the Mercedes) with dust in the air behind it and the other passengers were yelling about the car having just popped a tire. The white car continued past Hovey's car and out of sight. About five or 10 minutes later, Wheat saw the white car again—weaving in traffic—and he saw a motorcycle pass Hovey's car. The white car swerved into the center divider and struck the motorcycle knocking the rider off and into Hovey's lane of traffic about 30 to 40 feet in front of them. Hovey's car struck the rider. It all happened "really fast." After Hovey had pulled over to the side of the road, Wheat saw the white car "bail out."

Joseph Boktor was another passenger in Hovey's car. When he first saw the white Mercedes it was speeding up and slowing down. Then Boktor saw, and heard, the Mercedes' rear tire pop. The sound of the tire popping was very loud. The Mercedes then sped up to between 90 and 95 miles per hour and drove out of sight on a flat tire. Hovey later caught up with the white Mercedes, "an exit or two" down the freeway, maybe seven or eight minutes later. Boktor commented to his companions it was the same car that had popped its tire. Boktor looked down at the radio, and when he looked back up, saw a riderless motorcycle. The rider was rolling on the ground in front of them, and Hovey struck him. Boktor was certain he had seen the tire pop several minutes before the accident—not just right before.

Adam Cabacungan and three passengers were also driving on the 405 freeway that night. A white Mercedes passed his truck going about 100 miles an hour, nearly struck him, then pulled in front of him, started fish-tailing, spun out, and hit the center divider. Cabacungan pulled over, and as he got out of his car, a riderless motorcycle rolled past. As he made his way back to where Parrino's body lay, the Mercedes drove off down the freeway, with sparks flying from the rim of the tire.

Irvine Police Officer Tim Schilling had just pulled onto the southbound lanes of the 405 freeway when he saw Parrino's body lying on the road. He stopped his car, and immediately knew Parrino was dead. As Schilling looked north to the oncoming traffic, he saw a white Mercedes in the southbound lanes facing north against the center divider. The white Mercedes then made a U-turn across traffic and started driving south. As it passed, Schilling saw sparks flying from the rear end—the right rear tire was gone and the car was driving on its rim. Schilling pursued the white Mercedes, which was going at about 35 miles per hour, for about one-half mile until it came to a stop. Camacho opened the driver's door and fell out of the car. Camacho appeared completely intoxicated, was incoherent, could not walk without assistance, repeatedly urinated on himself, and then passed out in the

back of Schilling's patrol car. A California Highway Patrol (CHP) Officer arrived and took custody of Camacho.

CHP Officer Christopher West arrived to investigate the accident. He interviewed Hovey, who showed no signs of intoxication. West then went to interview Camacho, who was passed out in the back seat of a patrol car. After waking Camacho up, and advising him of his rights, Camacho told West he had consumed 10 beers and four shots of alcohol that evening. Camacho was too intoxicated to complete a field sobriety test. West testified he had made about 250 DUI arrests, and investigated about 500 DUI cases, and Camacho was the most intoxicated driver he had ever encountered. Camacho's blood-alcohol level was between .26 percent and .32 percent.

West arrested Camacho and transported him to Orange County Jail. During the booking process, he asked Camacho how he felt about the family of his victim. Camacho shrugged his shoulders and said, "'It's not my family.'"

West also testified about his personal experience with tire blowouts while driving at high speeds on the freeway. He testified motorists suffering blowouts are generally able to safely maneuver their cars out of traffic lanes to the side of the road.

Camacho had suffered three prior DUI convictions, including two on December 12, 2003. A volunteer from Mothers Against Drunk Driving (MADD) testified Camacho's signature appeared on the attendee sign-in sheet from a March 4, 2004, panel meeting. At that MADD meeting, a victim impact speaker told of her experience after having been hit and injured by a drunk driver. Another panel speaker at the MADD meeting testified he warned attendees about the dangers of drinking and driving.

Defense

The gist of Camacho's defense was that Parrino's and/or Hovey's conduct constituted intervening acts that caused Parrino's death.

Camacho called William Otto, an accident reconstruction expert, who testified that at the time of the tire blowout, Camacho was driving at about 89 miles per hour and the

car traveled about 393 feet after the blowout. Camacho had hit his brakes and traveled another 60 feet before coming to rest against the center divider. Parrino hit the Mercedes, was thrown off his motorcycle landing about 150 feet in front of the Mercedes, where he was struck by Hovey's car and thrown another 144 feet. Otto testified Parrino was traveling at a minimum of 67 miles per hour and at that speed would have been about 150 feet behind Camacho when the tire blew out. Otto opined that if Parrino had been going 90 miles an hour, he would have been about 300 feet behind the Mercedes when the tire blew out. Otto testified there was no evidence Parrino applied his brakes before hitting the Mercedes. The skid marks of Hovey's car had not been measured, so Otto could not determine Hovey's speed, but Hovey would have driven past the Mercedes before hitting Parrino, suggesting Hovey was driving too fast to avoid him.

On direct examination, Otto testified there was no indication Camacho's car had a blowout, but then continued to drive for seven to eight minutes. On cross-examination, he testified it was entirely possible there was a tread separation without a blowout happening at the time "a long way back" and that Camacho continued to drive. Otto agreed such a tread separation would likely cause a loud noise, and there could be a significant loss of control. He also agreed that after a tread separation, Camacho could have continued to travel at his same speed for a while before the tire completely failed.

Rebuttal

The prosecution called Wesley Vandiver, an accident reconstruction expert, on rebuttal. He testified that contrary to Otto's opinion, Parrino was traveling 50 to 58 miles per hour before striking Camacho's car and had been decreasing his speed. Vandiver testified a tread separation could occur and a tire could continue to be driven upon at high speeds for some time before completely failing. He agreed a tread separation would be very loud and would affect the handling of the car. Vandiver testified the damage to the tire on Camacho's car indicated that after an initial blowout, the tire had been subjected to extreme

speed for an extended period of time—i.e., a freeway exit or two (or a mile or two) before the exit at which the accident occurred.

DISCUSSION

1. Bifurcated Trial on Prior Conviction

Count 4 charged Camacho with driving on a suspended license in violation of Vehicle Code section 14601.5. It was further alleged he suffered a prior conviction for the same offense on December 12, 2003 (the same date upon which he also suffered two DUI convictions), within the meaning of Vehicle Code section 14601.5, subdivision (d). That section requires a defendant serve jail time for a second conviction within five years. Camacho moved to bifurcate his trial on the enhancement allegation. The trial court denied the request, concluding the prior conviction was relevant to the gross vehicular manslaughter charge and was not unduly prejudicial in view of the admissibility of evidence of Camacho's prior DUI convictions. Camacho contends the trial court erred by denying his request to bifurcate his trial on this enhancement allegation. We find no error.

In ruling on a request to bifurcate a sentence enhancement, the primary consideration is whether the admission of evidence relating to the enhancement during the trial on the "charged offense[s] would pose a substantial risk of undue prejudice to the defendant." (*People v. Calderon* (1994) 9 Cal.4th 69, 77-78 (*Calderon*) [prior conviction enhancement].) That determination rests within the sound discretion of the trial court. (*Id.* at pp. 79-80.) Bifurcation of a sentence enhancement is generally not required when the evidence relevant to the enhancement is also relevant and admissible in the trial of the underlying offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051 [criminal street gang enhancement]; *Calderon, supra,* 9 Cal.4th at pp. 78-79 [prior conviction enhancement].)

The trial court correctly concluded evidence of Camacho's prior driving on a suspended license conviction was admissible to prove his gross negligence with regards to the gross vehicular manslaughter count. (See Pen. Code, § 191.5, subd. (a).) As explained

in *People v. Bennett* (1991) 54 Cal.3d 1032, 1036: "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] 'The state of mind of a person who acts with conscious indifferences to the consequences is simply, "I don't care what happens."' [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]" The Supreme Court concluded that in determining gross negligence, "The jury should therefore consider *all relevant circumstances* . . . to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence. [Citation.]" (*Id.* at p. 1038.) That at the time of the accident causing Parrino's death, Camacho was driving with a blood-alcohol level of up to .32 percent on a suspended license, had three prior DUI convictions, and less than one year earlier suffered a conviction for driving on a suspended license, was relevant to demonstrate he acted with a conscious disregard of the consequences of his act.

Furthermore, the trial court did not abuse its discretion in concluding Camacho would not be unduly prejudiced by the jury hearing about his prior conviction for driving on a suspended license. (*Calderon, supra*, 9 Cal.4th at pp. 77-78.) As Camacho concedes, his three prior DUI convictions were going to come into evidence anyway. Two of those convictions occurred on the same date as his prior conviction for driving on a suspended license. Under the circumstances, the evidence of the prior conviction for driving on a suspended license was certainly no more prejudicial than the evidence of the DUI convictions.

2. Admissibility of Camacho's "'Not My Family'" Statement Made After Arrest

West testified that during the booking process he asked Camacho how he felt about Parrino's family, and Camacho shrugged his shoulders and said, "'It's not my family.'" The admissibility of the statement was the subject of an Evidence Code section 402 hearing before trial began. The trial court undertook an Evidence Code section 352 analysis and concluded the statement was highly probative on the implied

malice murder count (as it demonstrated a conscious disregard for human life) and was not unduly prejudicial. Camacho contends the trial court erred in admitting the statement as it was not relevant to any issue in the case, because it simply showed a lack of remorse on his part, and was highly prejudicial. We disagree.

The trial court correctly determined Camacho's statement was relevant to the second degree murder count. "Murder is the unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a).) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188.) Stated another way, "[m]alice is implied when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*People v. Knoller* (2007) 41 Cal.4th 139, 143; see also *People v. Taylor* (2004) 32 Cal.4th 863, 868.) The standard is subjective—the defendant must have actually appreciated the risk involved. (*People v. Watson* (1981) 30 Cal.3d 290, 297.)

Camacho argues a statement made after the crime displaying lack of remorse about the crime is irrelevant to the issue of malice. He relies upon *People v. Jones* (1998) 17 Cal.4th 279, 307, and *People v. Clark* (1993) 5 Cal.4th 950, 1016, for the proposition that "unless a defendant opens the door to the matter in his or her case-in-chief . . . his or her remorse is irrelevant at the guilt phase." But those cases were first degree murder cases, not implied malice second degree murder cases, and are thus not applicable.

In an implied malice second degree murder case, statements demonstrating a defendant acted with a conscious disregard for human life are highly relevant even when

those statements are made after the crime. For example, in *People v. Burden* (1977) 72 Cal.App.3d 603, 620, defendant was convicted of second degree murder on an implied malice theory following the starvation death of his five-month-old son. Statements defendant made to police *after* the child's death that he knew the child was literally starving to death, but did nothing "because he 'just didn't care'" established defendant had acted with "'wanton disregard for human life'" in the weeks before the child's death. The court observed, "[a] defendant's lack of concern as to whether the victim lived or died, expressed or implied, [have] been found to be substantial evidence of an 'abandoned and malignant heart' . . . ." (*Id.* at pp. 620-621.)

Here, Camacho's statement made to police within a few hours of his arrest, indicating his complete lack of concern for his victim's family, reasonably translated to a lack of concern about his victim (or anyone else on the highway that night) as well. Camacho's statement was a small part of the implied malice evidence—it was coupled with the evidence of his three prior DUI convictions and the fact he had quite recently attended MADD seminars at which the potentially devastating consequences of drunk driving were discussed. But it was nonetheless highly relevant to establish he acted with conscious disregard for life when he consumed massive quantities of alcohol and then got behind the wheel. (See *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1849, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3 [prior DUI convictions and attendant educational programs relevant to prove knowledge element of implied malice].)

Nor can we say the trial court abused its discretion in concluding as part of its Evidence Code section 352 analysis the evidence was not unduly prejudicial. In view of the other evidence concerning Camacho's lack of concern about the consequences of his actions, it could not be said admission of the statement "pose[d] an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) We also note Camacho has failed to demonstrate a miscarriage of justice due to the evidence having been admitted. In the scheme of the trial, the statement

was largely insignificant. West's testimony concerning Camacho's statement was quite brief—comprised of one question and one answer, and the statement was not referred to by the prosecutor in closing argument.

3. Causation Instruction

Camacho contends the trial court erred by refusing to instruct the jury with his proffered special instruction on causation. We find no error.

The defense theory was Camacho's conduct was not a substantial factor in causing Parrino's death. Rather, he contended, Parrino's conduct (failing to drive slow enough to avoid hitting Camacho's car when it spun out) and/or Hovey's conduct (failing to drive slowly enough past Camacho's spun out car to avoid running over Parrino), constituted unforeseeable intervening events that broke the chain of causation.

Consistent with his defense theory, Camacho offered a special instruction that provided as follows: "The failure of . . . Parrino or . . . Hovey to use reasonably [*sic*] care may have contributed to the death of . . . Parrino. But if the acts of the Defendant were a substantial factor causing the death of . . . Parrino then the Defendant is legally responsible for his death even though . . . Parrino and . . . Hovey failed to use reasonable care. [¶] On the other hand, if the act of the Defendant was not [a] substantial factor [in] causing the death, but the death was caused . . . by an unforeseeable, extraordinary, or abnormal occurrence of either . . . Parrino or . . . Hovey then the Defendant is not legally responsible for the death. [¶] If you have a reasonable doubt whether the Defendant's act caused death you must find him not guilty."

The court refused Camacho's proffered instruction. Instead, it instructed the jury with modified versions of Judicial Council of California Criminal Jury Instructions (2007) CALCRIM Nos. 240 and 620. Although Camacho does not specifically complain the two instructions given were incorrect, he does complain that without his additional instruction the jury was never told "what to do if [his] act was **not** a substantial factor causing [Parrino's] death[,]" or that "an intervening act might break the chain of causation."

Camacho argues his proffered instruction was an appropriate rewording of section B of CALCRIM No. 620. That optional paragraph concerning the intervening negligence of medical personnel is used to instruct the jury that if a defendant was a substantial factor in causing death, negligence of medical personnel that also contributed to the death would not relieve the defendant. But "[o]n the other hand, if the injury inflicted by the defendant was not a substantial factor causing the death, but the death was caused by grossly improper treatment by [medical personnel], then the defendant is not legally responsible for the death." But Camacho's argument is premised upon a comparison of his proffered instruction with the *unmodified* version of CALCRIM No. 620, rather than the modified version that was given.

"A trial court must instruct the jury, even without a request, on all general principles of law that are '"closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] In addition, "a defendant has a right to an instruction that pinpoints the theory of the defense. . . ."' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.)

The trial court did not err in refusing Camacho's proffered special instruction because the law was covered by the other instructions given. As given, CALCRIM No. 240 instructed as follows: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A

substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the death."

As given, CALCRIM No. 620 instructed as follows: "There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] The failure of another person to use reasonable care may have contributed to the death. But if the defendant's act was a substantial factor causing the death, then defendant is legally responsible for the death even though the decedent or another person may have failed to use reasonable care. [¶] A defendant may be relieved of criminal responsibility if an independent intervening event caused the death. To be an independent intervening event, the cause of death must be an unforeseeable, extraordinary and abnormal occurrence. An intervening event that is a normal and foreseeable result of the defendant's original act does not relieve him of criminal responsibility. [¶] If you have a reasonable doubt whether the defendant's act caused the death, you must find him not guilty."

The modified version of CALCRIM No. 620 correctly stated the law and adequately encompassed the theory asserted by Camacho in his special instruction. The first paragraph of the modified CALCRIM No. 620 was a verbatim reiteration of the last sentence in CALCRIM No. 240. The second and fourth paragraphs of the modified CALCRIM No. 620 were essentially identical to the first and third paragraphs of Camacho's proffered instruction (with the exception it did not specifically name Parrino and Hovey as possible negligent actors). The third paragraph of the modified CALCRIM No. 620 told the jury a defendant could be relieved of criminal responsibility if an independent intervening event that was an "unforeseeable, extraordinary and abnormal occurrence" caused the death. Save for the reference to Parrino or Hovey, we fail to see any meaningful distinction between that language and the second paragraph of Camacho's special instruction, which explained he would not be legally responsibly for the death if it was "caused by an

unforeseeable, extraordinary, or abnormal occurrence of either . . . Parrino or . . . Hovey . . . ." The court did not err in refusing Camacho's largely duplicative instruction.

4. Denial of Motion for Acquittal

Camacho contends the trial court applied the wrong standard of review in denying his motion for acquittal. We find no error.

Penal Code section 1118.1 provides that before a case is submitted to the jury, on a defendant's or the court's own motion, the court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." When it denied Camacho's motion to acquit, the court commented "the test . . . would be whether or not there is sufficient evidence to sustain a conviction on appeal, and the court feels that there is at this point in time. The court feels this is a decision for the jury. [¶] . . . I think there has been plenty of evidence to sustain a conviction on appeal, if the jury [does] not find that there was an independent intervening act, so I am going to let them make the call[.]"

There appear to be two aspects to Camacho's argument. He cites various cases for the proposition the test to be applied by the trial court on a Penal Code section 1118.1 motion is "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any *substantial evidence* of the existence of each element of the offense charged. [Citations.]" (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1022, italics added.) He then highlights the trial court's comment the test was "whether or not there is *sufficient evidence* to sustain a conviction on appeal" and posits the court applied the wrong test (i.e., a "sufficient evidence" test instead of a "substantial evidence" test). The argument is frivolous and we need not address it further. The trial court clearly understood the proper test to be applied to a motion for acquittal.

Camacho also highlights the trial court's comment it was a "decision for the jury," and the jury should "make the call." He argues the court obviously applied the wrong standard because when ruling on a motion for acquittal it is the *judge* who must make the decision that evidence is sufficient to survive a motion for acquittal, not the jury. Again the argument is frivolous. The clear import of the court's comment was the evidence was sufficient to sustain a finding of guilt on appeal, and it would leave it for the jury to decide Camacho's guilt. Interestingly, nowhere in Camacho's brief does he argue the evidence at the close of the prosecution case was not sufficient to sustain a conviction on appeal—we are satisfied it was—and he does not raise any substantial evidence arguments on appeal.

5. Griffin Error

Camacho contends comments by the prosecutor constituted "*Griffin* error" requiring reversal of his conviction. We disagree.

We begin with the relevant facts. In closing argument, the prosecutor made the following statement regarding Camacho's defense: "So what you are about to see when [defense counsel] stands up, folks, you are going to hear the drunk guy pointing his finger at that kid [Hovey] and calling him a liar. The guy who fled the scene is pointing his finger, in this entire defense pointing his finger at the kid who tried to help. . . . [¶] . . . [¶] And the drunk guy, through his lawyer, is going to call him a liar." The prosecutor then discussed the testimony of Hovey and his two passengers and defense counsel's efforts during cross-examination to attack the veracity of their testimony. Defense counsel raised no objections to the prosecutor's comment.

In his closing, defense counsel argued Hovey and Parrino were responsible for Parrino's death—both were driving too fast through the accident scene after Camacho had spun out. Defense counsel argued Hovey was untruthful in his testimony about his speed and what he saw prior to striking Parrino. Defense counsel argued, "Hovey is a killer. He had ample time to slow down. He had ample time to avoid this entire traffic event. [Hovey] got a windfall because . . . Camacho was there that night, and he had too much to drink.

You better believe . . . Hovey was jumping for joy when they yanked . . . Camacho out of his car and he couldn't even stand up." Defense counsel also argued Camacho was not "speaking through [him]" and the jury should not penalize Camacho because of anything he said.

In rebuttal, the prosecutor commented trial counsel are "mouthpieces" and "advocates for a position" and for their clients. He said, "And folks, the drunk guy, through his lawyer, I will say it again, is blaming the victim. And that's what the entire defense is. It is blaming the victim, and he is blaming . . . Hovey." Later, the prosecutor reiterated Camacho was "blaming everybody else on the road. . . . And when you look at how drunk he was that night, I mean this guy (indicating) is telling you folks that he is not responsible for this. That his intoxication did not play a substantial role in creating this accident. It is outrageous. It is absolutely patently outrageous."

After closing arguments concluded, the court excused the jury for the night. The next morning, Camacho's defense counsel moved for a mistrial contending the prosecutor's comments constituted *Griffin* error because he was, in effect, commenting on Camacho's failure to testify. The trial court denied the motion, concluding the comments did not reflect on Camacho's failure to testify, but rather were comments upon the defense theory. The court instructed the jury with CALCRIM No. 355, advising that the jury could not consider a defendant's failure to testify, and CALCRIM No. 222 advised the jury attorney comments and argument are not evidence.

In *Griffin, supra,* 380 U.S. 609, the United States Supreme Court held the Fifth Amendment prohibits a prosecutor from commenting, either directly or indirectly, upon the defendant's failure to testify in his own defense. (*Id.* at p. 613.) "It is well established, however, that the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Medina* (1995) 11 Cal.4th 694, 755.) In reviewing a defendant's claim of *Griffin* error, we examine whether there is a

reasonable likelihood the jury understood the remarks, within context, to be a comment on the defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

Here, the prosecutor did not commit *Griffin* error, as his comments did not directly or indirectly refer to Camacho's failure to testify, but were fair comments on the merits of the defense theory, i.e., that Hovey was not being truthful about his driving that night and Hovey's conduct was an unforeseeable intervening act that brought about Parrino's death. The *Griffin* rule does not "cut off the prosecution's 'fair response' to the . . . argument of the defendant." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1611-1612, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.)

Finally, even if the prosecutor's arguments could be considered misconduct, the trial court admonished the jury that arguments by counsel are not evidence, the defendant has a constitutional right not to testify, and the jury was not to infer guilt from the fact that the defendant does not testify. Jurors are presumed to follow the court's admonitions and instructions. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.) We find the court's instructions to the jury cured any potential *Griffin* error by the prosecutor.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.